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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 CORECIVIC, INC.,

15 Plaintiff,

16 v.

17 CANDIDE GROUP, LLC and MORGAN
SIMON,

18 Defendants.
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Case No. 4:20-cv-03792-WHA

Assigned to the Hon. William Alsup

**NOTICE OF MOTION AND SPECIAL
MOTION TO STRIKE PLAINTIFF'S
COMPLAINT**

[Cal. Code Civ. Proc. § 425.16]

[Supporting Declaration and Exhibits Thereto,
and Request for Judicial Notice Filed
Concurrently]

Judge: Hon. William Alsup

Date: October 22, 2020

Time: 8:00 a.m.

Location: San Francisco Courthouse
Courtroom 7 – 19th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Action Filed: March 4, 2020

Action Transferred: June 7, 2020

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

1. PLEASE TAKE NOTICE that on October 22, 2020, in Courtroom 12 of the United States District Court for the Northern District of California, located on the 19th Floor in the San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, defendants Candide Group, LLC (“Candide”) and Morgan Simon (“Simon”) (together, “Simon” or “Defendants”) will and do move this Court, pursuant to California Code of Civil Procedure (“C.C.P.”) § 425.16 (the “anti-SLAPP statute”), for an order striking the Complaint filed by Plaintiff CoreCivic, Inc. (“CoreCivic”), for the following reasons:

1. The Anti-SLAPP statute applies to all of CoreCivic’s claims because they arise from Simon’s free speech made in a public forum about public issues. Memorandum (“Mem.”) § II. The burden is thus on CoreCivic to establish a probability that it will prevail (C.C.P. § 425.16(b)(1)), and it cannot, for the following reasons:

2. CoreCivic has not alleged and cannot allege Simon’s post of September 25, 2018 was published or republished within the one-year limitations period. Mem. § III.A.

3. CoreCivic has not alleged and cannot allege that statements at issue concerning family separation are materially false, and even “implication” alleged by CoreCivic would amount to a non-actionable expression of opinion. Mem. § III.B.

4. CoreCivic has not alleged and cannot allege that statements at issue concerning lobbying are actionable; they are protected opinion, and are not defamatory. Mem. § III.C.

5. CoreCivic has not alleged and cannot allege that Simon published the statements at issue with actual malice. Mem. § III.D.

If the Court decides that CoreCivic can meet its burden with respect to any of its claims or specific statement at issue, Simon requests that the Court grant her motion to strike as to the remaining claims and/or statements alleged. *See Baral v. Schnitt*, 1 Cal. 5th 376, 393 (2016).

This motion is based on this notice; the attached memorandum; the concurrently filed request for judicial notice and declaration of Thomas R. Burke (“Burke Dec.”) with Exhibits 1-12; any other matters of which this Court may take judicial notice; all pleadings, files, and records in this action; and such other argument as this Court may receive at the hearing on this motion.

1 DATED: August 6, 2020

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
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3 By: /s/ Thomas R. Burke
Thomas R. Burke

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INTRODUCTION

CoreCivic, Inc.—one of the largest private prison and detention center operators in the United States—seeks to silence and punish one of its most effective critics by contriving a defamation suit where no claims can lie. Defendant Morgan Simon, founding partner of Defendant Candide Group LLC, is a life-long activist for social justice who authors and publishes opinion pieces on Forbes.com’s contributor platform. In a series of three posts describing successful efforts by a coalition of activists (including Simon) to encourage banks to stop lending to private prisons, Simon noted how the separation of immigrant families at the border has drawn increased attention to the outsized role played by private prisons—including CoreCivic—in detaining immigrants for profit. Citing to and relying on specific published reports disclosing CoreCivic’s involvement in the development of model legislation criminalizing undocumented immigrants, as well as its donations to lawmakers who sponsored that legislation, Simon also criticized CoreCivic’s “lobbying” for harsher criminal and immigration laws. CoreCivic does not and cannot deny that it operates immigration detention facilities where migrants are housed (some after being separated from family members). Nor does the Complaint deny that CoreCivic has spent millions in lobbying to secure government appropriations to operate these detention facilities and prisons. The Complaint also does not deny that CoreCivic was present at a meeting where criminal immigration legislation was developed, or that it donated to state lawmakers who supported that legislation. Indeed, CoreCivic could hardly contest that harsh criminal and sentencing laws have financially benefitted its business. Yet CoreCivic insists a false and defamatory meaning should be read into Simon’s posts, and attempts to construct such meaning by imposing unsupportable “implications” upon some statements, and subjecting others to hyper-literal constructions. These contrived claims do not make it past the starting line.

California’s anti-SLAPP statute was designed to dismiss lawsuits just like this one. Because the lawsuit targets the exercise of free speech in a public forum and involving matters of indisputable public interest/public concern, CoreCivic must show a probability of prevailing on the merits of its claims. It cannot do so.

First, CoreCivic has not alleged and will be unable to prove that statements in Defendants’

1 first Forbes post, of September 25, 2018, were published or republished within the one-year
 2 limitations period. Mem. § III.A. **Second**, CoreCivic has not alleged that any of Simon's
 3 statements concerning family separation were materially false, an essential component of any
 4 defamation claim. Moreover, even accepting the unreasonable reading of these statements alleged
 5 by CoreCivic, that would still amount to an expression of Simon's opinion, which is not actionable
 6 as a matter of law. Mem. § III.B. **Third**, CoreCivic has not alleged that Simon's statements about
 7 legal lobbying are actionable. The context and specific language of the statements makes clear
 8 that Simon is offering her partisan opinion based on disclosed third party reports, and no reader
 9 would subject these statements to the hyper-literal reading CoreCivic presses. Moreover, because
 10 it has not pled that it has incurred special damages, CoreCivic must show these statements are
 11 defamatory on their face, Cal. Civ. Code §§ 45, 45a. It borders on ridiculous for a publicly traded
 12 company whose business model is built upon the incarceration of people for the lowest possible
 13 cost—a company whose bottom line is inexorably tied to the number of people under its control at
 14 any given time—to claim that a characterization of their legal lobbying activities could somehow
 15 damage its reputation. In light of CoreCivic's known and admitted activities, it is simply
 16 innocuous, and not actionable as a matter of law, to claim that CoreCivic lobbies in favor of more
 17 stringent criminal and immigration laws. Mem. § III.C. **Finally**, CoreCivic—a public figure by
 18 virtue of its prominence in the private prison sector—has not plausibly alleged that Simon
 19 published the statements at issue with actual malice, *i.e.*, knowing the statements were false or
 20 with reckless regard as to whether they were false. Indeed, the Complaint itself alleges that Simon
 21 relied on reputable third party sources for her statements concerning lobbying—sources CoreCivic
 22 even alleges Simon *should have* relied on—precluding a finding of actual malice as a matter of
 23 law. *See* Compl. ¶¶ 81-82; Mem. § III.D.

24 For these reasons, Simon respectfully asks that the Court dismiss this lawsuit with
 25 prejudice and award attorneys' fees, in a motion that will be separately briefed.

26 **FACTUAL BACKGROUND**

27 **A. The Parties**

28 CoreCivic, formerly known as Corrections Corporation of America (or CCA), is one of the

1 nation's largest operators of private prisons. Compl. ¶¶ 7, 47, 81. CoreCivic also operates
 2 detention centers that incarcerate immigrants detained by Immigrations and Customs
 3 Enforcement. Ex. 11 at 10.¹ CoreCivic describes itself as a "government-solutions company" that
 4 "solve[s] tough government challenges in cost-effective ways." Ex. 11 at 1. In other words,
 5 incarcerating people—in prisons, detention facilities, and "reentry facilities," *id.*—traditionally the
 6 sole prerogative of government, is CoreCivic's profit-driven business.

7 Simon is a lifelong activist for social justice issues. *See* Ex. 9. Through her company,
 8 Candide, Simon advises clients on socially responsible means of investment and financial
 9 management. *See* Compl. ¶¶ 14-18; Ex. 10. Simon is the author of *Real Impact: The Economics*
 10 *of Social Change* (Bold Type Books, 2017). Compl. ¶ 23 & n.7. Simon also organizes social
 11 justice campaigns, *see* Compl. ¶¶ 14, 108, and has been a key organizer of a grassroots movement
 12 against the private prison industry. *See id.* ¶ 49. Simon helped spearhead a resoundingly
 13 successful public outreach campaign to convince banks and other lenders to stop lending to private
 14 prison companies, including CoreCivic. *Id.* ¶¶ 57; 104-116; Exs. 1-5.

15 Simon is a senior contributor to Forbes.com's contributor platform, where she writes about
 16 investing and "building bridges between finance and social justice." *See* Ex. 1 at 6; Compl. ¶ 24.
 17 While she is the sole listed author of her posts at Forbes.com, Simon discloses her association with
 18 Candide. *See, e.g.*, Ex. 1 at 6.

19 **B. Simon's Forbes Posts**

20 The Complaint takes issue with a series of posts published by Simon on the Forbes
 21 contributor platform (collectively, the "Forbes Posts"). These posts are summarized as follows:

22 On September 25, 2018, Simon published a post at Forbes.com entitled "What Do Big
 23 Banks Have To Do With Family Detention? #FamiliesBelongTogether Explains" (the "Sept. 25,
 24 2018 Post"). *See* Ex. 1. The Sept. 25, 2018 Post consists largely of an interview with two
 25 members of the Families Belong Together coalition, a group of (then) 85 organizations working
 26 "to urge Wells Fargo and JP Morgan Chase to stop financing GEO Group and CoreCivic." Ex. 1
 27 at 2. In the interview, the coalition members describe how "Families Belong Together emerged in
 28 _____

¹ Numbered exhibits refer to exhibits to the Declaration of Thomas R. Burke, filed herewith.

1 response to the family detention crisis, starting with the recent separation of families at the border
 2 which drew national attention to what has been a long-standing issue.” *Id.* at 3. They describe
 3 how the coalition has since expanded its work to focus on private prisons more generally, with a
 4 focus on the few largest “for-profit prison corporations that hold contracts to operate [immigrant]
 5 detention centers, and are profiting off the pain and separation of families,” including CoreCivic.
 6 *Id.* The interviewees say that “[o]ur immigration system should not be run like a for-profit
 7 incarceration business,” and describe their campaign to get major banks to “stop financing”
 8 CoreCivic and others. *Id.* at 5.

9 On March 5, 2019, Simon published a follow up post at Forbes.com titled “JPMorgan
 10 Chase Is Done With Private Prisons” (the “March 5 Post”). *See* Ex. 2. Stating that “JPMorgan
 11 Chase announced early this morning that they will stop financing . . . CoreCivic,” and including a
 12 hyperlink to the Sept. 25, 2018 Post, *id.* at 2, the post describes how, “[s]ince news of family
 13 separation at the southern border began shedding more light on the abuses inside such private
 14 facilities, activists across the country have been paying careful attention to who actually enables
 15 private prison companies in their day to day operations.” *Id.* at 2. Per Simon, because “a third of
 16 all immigrant detention centers are privately owned,” the events at the border spurred a broader
 17 movement to pressure banks and investors to stop doing business with private prison and
 18 immigrant detention companies. *Id.* at 2. The post also calls out CoreCivic specifically, saying
 19 that it and its largest competitor “have a long history of profiting from mass incarceration: they
 20 make money when beds are filled, justly or unjustly, which is why they’ve spent \$25M on
 21 lobbying over the past three decades to push for harsher criminal justice and immigration laws.”
 22 *Id.* at 2. Within this passage, hyperlinks directed readers to supporting articles published by NPR
 23 and Business Insider, upon which Simon relied. Compl. ¶¶ 81-82. The NPR Article reports on the
 24 private prison industry’s role in the development of an Arizona law requiring the incarceration of
 25 anyone who cannot prove their legal immigration status. Ex. 6 at 3. It reports that CoreCivic sent
 26 representatives to a meeting of the American Legislative Exchange Council (“ALEC”), where the
 27 bill was first presented, that it donated to state legislators who co-sponsored the bill, and that it
 28 sent a lobbyist to work the state capitol the same week the bill was introduced. *Id.* at 6-9. The

1 Business Insider Article similarly reports on “efforts” by CoreCivic and other private prison
 2 companies “on Capitol Hill and in statehouses across the country to lobby for laws that expand
 3 demand for their own services.” Ex. 7 at 2. *See also* Burke Decl. ¶¶ 7-8.

4 On September 30, 2019, Simon published another post at Forbes.com, titled “GEO Group
 5 Runs Out of Banks as 100% of Banking Partners Say ‘No’ to the Private Prison Sector” (the
 6 “September 30 Post”). *See* Ex. 3. Simon writes that, “in the wake of demands by grassroots
 7 activists — many under the banner of the #FamiliesBelongTogether coalition,” nearly all banking
 8 partners to major prison companies “have now officially committed to ending ties with the private
 9 prison and immigrant detention industry.” *Id.* at 1. The post describes the financial consequences
 10 of these successful campaigns, and also provides “a brief historical recap” of “the American
 11 private prison industry.” *Id.* at 2. Again linking to the NPR Article and Business Insider Article,
 12 it notes that “[g]iven their business model depends on keeping a consistent and increasing number
 13 of people incarcerated, it’s been speculated and critiqued that this is why GEO Group and
 14 CoreCivic have spent \$25M on lobbying over the past three decades to push for harsher criminal
 15 justice and immigration laws.” *Id.* at 3.

16 C. CoreCivic Takes Issue With the Forbes Posts

17 On October 2, 2019, attorneys for CoreCivic sent Simon a letter taking issue with the
 18 March 5 Post and September 30 Post. *See* Compl. Ex. E. The letter insisted that “CoreCivic does
 19 not lobby for any policies or legislation that would determine the basis for or duration of any
 20 individual’s incarceration or detention.” *Id.* at 1. The letter also noted that this denial was quoted
 21 in the NPR and Business Insider reports, as well as in CoreCivic’s federal lobbying disclosures,
 22 which are available through several online databases. *Id.* at 1-4. Next, the letter insisted that
 23 “CoreCivic does not and has never housed children separated from their parents pursuant to the
 24 Trump family separation policy,” claiming Simon’s references to the Families Belong Together
 25 coalition and use of a #FamiliesBelongTogether hashtag implied otherwise. *Id.* at 4.

26 On October 10, Simon updated the two posts in response to CoreCivic’s letter. In the
 27 March 5 Post, Simon added a clarification at the bottom stating that “[t]his article does not intend
 28 to suggest that CoreCivic . . . housed children separated from their parents pursuant to the Trump

family separation policy,” and explaining that Simon personally “view[s] the phenomena of family separation as . . . inclusive of separating a grown adult from their aging parent, or spouse from spouse, or a parent being incarcerated while their child remains free, etc.” Ex. 4 at 5. In both the March 5 and September 30 Posts, Simon updated the language concerning lobbying to include CoreCivic’s denial that it lobbies on criminal or immigration law, as well as additional information concerning CoreCivic’s lobbying on bills relating to ICE funding and its membership in ALEC. *See* Ex. 4 (“Updated March 5 Post”) at 2; Ex. 5 (“Updated September 30 Post”) at 3. Within this text, Simon hyperlinked to several more sources, including the report by the Justice Policy Institute (the “JPI Report”)—the same report cited in the Business Insider Article. *See* Ex. 7 at 2. The JPI Report describes how, “[t]hrough campaign contributions, lobbying and building relationships and associations, private prison companies,” including CoreCivic specifically, “engage in an aggressive political strategy to influence criminal justice policies,” including by “fighting policies that might reduce the use of incarceration.” Ex. 8 at 15-16.

On October 29, 2019, CoreCivic wrote Simon another letter claiming Simon had not sufficiently retracted the statements at issue. *See* Compl. Ex. F. Simon did not edit the Forbes Posts any further. Compl. ¶ 68.

D. The Complaint

On March 4, 2020, CoreCivic filed this action in the U.S. District Court for the Central District of California. The case was thereafter transferred by consent to the Northern District of California. *See* Dkt. 23. In the Complaint, CoreCivic alleges that Simon, and by extension her firm Candide, defamed it in the Forbes Posts, and in the tweet promoting one of the posts. The Complaint focuses on statements concerning (1) the separation and detention of immigrant families (the “Family Separation Statements”); and (2) Plaintiff’s lobbying activities (the “Lobbying Statements”). The Complaint asserts claims for defamation and for defamation by implication based on the same sets of statements. *See* Compl. ¶¶ 120, 135.

1. The Family Separation Statements

CoreCivic contends that in the Family Separation Statements, Simon linked it to the detention of migrant children at the southern U.S. border by, among other things, describing

1 events at the border, noting that CoreCivic operates “detention centers,” and referring to the
 2 Families Belong Together coalition. *See* Compl. ¶¶ 47-57. The Complaint ***admits that CoreCivic***
 3 ***does operate immigrant detention centers***, Compl. ¶ 7; Ex. 11 at 10, but maintains that it has
 4 never “operated any immigration detention facilities ***for children*** separated from their parents
 5 pursuant to the government’s family separation policy.” Compl. ¶ 42. The Complaint does not
 6 deny that CoreCivic detains immigrant families, as well as immigrant adults who have been
 7 separated from their family members at the border. *Id.*

8 The Complaint focuses in particular on one passage from the Sept. 25, 2018 Post, which
 9 reads: “The two largest private prison companies,” including CoreCivic, “have over \$2BN a year
 10 in ICE contracts, managing some of the detention centers that have been at the heart of the
 11 controversy over the separation of families and incarceration of individuals for crossing the US
 12 border.” *See* Ex. 1 at 2; Compl. ¶¶ 48, 66. It also cites each instance of Simon using the terms
 13 “Family Separation” or “Families Belong Together” in the Forbes Posts. *See* Compl. ¶ 120. The
 14 additional challenged statements are:

- 15 • “Families Belong Together emerged in response to the family detention crisis, starting
 16 with the recent separation of families at the border which drew national attention to
 what has been a long- standing issue.” (Sept. 25, 2018 Post)
- 17 • “CoreCivic and GEO Group, two large for-profit prison corporations that hold
 18 contracts to operate detention centers, and are profiting off the pain and separation of
 families.” (Sept. 25, 2018 Post)
- 19 • Referring to CoreCivic as one of “the largest operators of private prisons and
 20 immigrant detention centers in the U.S.” (March 5 Post)
- 21 • “Since news of family separation at the southern border began shedding more light on
 22 the abuses inside such private facilities, activists across the country have been paying
 careful attention to who actually enables private prison companies in their day to day
 operations.” (March 5 Post)

23 Compl. ¶¶ 120, 135.

24 In an attempt to avoid the one-year statute of limitations, the Complaint alleges that the
 25 Sept. 25, 2018 Post was republished when Simon hyperlinked to it in the March 5 Post, and again
 26 when Simon updated the March 5 Post on October 10, 2019. Compl. ¶ 120(b). The Complaint
 27 also contends the March 5 Post was republished via a March 6, 2019 tweet by Simon, in which she
 28 linked to the March 5 Post. *Id.* ¶ 120(c).

2. *The Lobbying Statements*

CoreCivic contends that in the Lobbying Statements, Simon accused it of lobbying to pass harsher criminal sentencing and immigration laws. CoreCivic maintains that it “has never lobbied for harsher sentences or immigration laws.” Compl. ¶ 75. The Complaint identifies Simon’s statement in the March 5 post that “GEO Group and CoreCivic . . . make money when beds are filled, justly or unjustly, which is why they’ve spent \$25M on lobbying over the past three decades to push for harsher criminal justice and immigration laws,” Ex. 2 at 2, as well as her statement in the September 30 Post that: “Given their business model depends on keeping a consistent and increasing number of people incarcerated, it’s been speculated and critiqued that this is why GEO Group and CoreCivic have spent \$25M lobbying over the past three decades to push for harsher criminal justice and immigration laws.” Ex. 3 at 2. The Complaint also takes issue with Simon’s clarification edits in both posts. Ex. 4 at 2; Ex. 5 at 3. *See also* Compl. ¶¶ 120, 135.

ARGUMENT

I. STANDARD ON A SPECIAL MOTION TO STRIKE

California enacted its “broad” anti-SLAPP law to quickly dispose of meritless claims that target free speech. *Braun v. Chronicle Publ’g Co.*, 52 Cal. App. 4th 1036, 1042 (1997); *see also* *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015-16 (9th Cir. 2013) (“[i]t would be difficult to find a value of a ‘high[er] order’ than the constitutionally-protected rights to free speech and petition that are at the heart of California’s anti-SLAPP statute”). Under C.C.P. § 425.16(b)(1), any “cause of action against a person arising from any act . . . in furtherance of the person’s right of . . . free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” To evoke the anti-SLAPP statute, the moving party first must show the plaintiff’s claims arise from protected conduct under the statute. *Sarver v. Chartier*, 813 F.3d 891, 901 (9th Cir. 2016) (citation omitted). Once the defendant makes such a showing, a court must look to the merits of the plaintiff’s claims. *Id.*

When, as here, “an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and

consider whether a claim is properly stated.” *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834, *amended by* 897 F.3d 1224 (9th Cir. 2018). Accordingly, to survive an anti-SLAPP motion challenging the complaint’s legal sufficiency, a plaintiff must allege sufficient facts to raise a right to relief above the speculative level—that is, the claim to relief must be plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A claim has facial plausibility when its factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Kelsey K. v. NFL Enterprises, LLC*, 254 F. Supp. 3d 1140, 1143 (N.D. Cal. 2017), *aff’d*, 757 F. App’x 524 (9th Cir. 2018) (Alsup, J.). Although a court must take “well-pleaded factual allegations” as true for purposes of a Rule 12(b)(6) motion, legal conclusions “are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679.

Early dismissal at the pleading stage is especially appropriate in cases like this one, which targets constitutionally protected speech. *Winter v. DC Comics*, 30 Cal. 4th 881, 892 (2003) (“because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable.”) (citation omitted); *Flowers v. Carville*, 310 F.3d 1118, 1131 (9th Cir. 2002).

II. THE ANTI-SLAPP STATUTE APPLIES TO CORECIVIC’S CLAIMS.

Simon easily meets her burden to show the anti-SLAPP statute applies. The Complaint’s two defamation claims both arise from Simon’s free speech made in a “public forum”—Forbes.com’s website—concerning an “issue of public interest”—private corporations’ reach into taxpayer-funded, traditionally governmental realms of incarceration and immigrant detention, and the human rights abuses that invariably result. *See* C.C.P. § 425.16(e)(3), (e)(4); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4 (2006) (“Web sites accessible to the public . . . are ‘public forums’ for purposes of the anti-SLAPP statute.”) (citations omitted); *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 151 (2019) (the anti-SLAPP statute applies where, e.g., the defendant “participated in, or furthered, the discourse that makes an issue one of public interest”). CoreCivic challenges multiple statements in its two defamation claims. The Court must strike any challenged statements that are not actionable as a matter of law. *Wallace v. McCubbin*, 196 Cal.

App. 4th 1169, 1209 (2011) (“in response to an anti-SLAPP motion . . . a *part* of a cause of action could be struck because the plaintiff failed to establish a probability of prevailing *as to that particular part*”) (citing *Taus v. Loftus*, 40 Cal. 4th 683, 742-43 (2007)); C.C.P. § 425.16(b)(1).

III. CORECIVIC’S CLAIMS FAIL AS A MATTER OF LAW

A. The Sept. 25, 2018 Post Is Outside the Statute of Limitations, and Was Not Republished

The Sept. 25, 2018 Post was published more than a year before the Complaint was filed on March 4, 2020, exceeding California’s one-year statute of limitations on libel claims. *See* Cal. Code Civ. Proc. § 340(c). The Complaint attempts to skirt the limitations period by alleging that the Sept. 25, 2018 Post was *republished* when it was hyperlinked in the March 5 Post, and again when the March 5 Post was updated. However, California follows the “single publication rule,” pursuant to which the Sept. 25, 2018 Post is deemed published on the date it was first posted. *Hebrew Acad. of San Francisco v. Goldman*, 42 Cal. 4th 883, 892 (2007) (citation omitted); *Oja v. U.S. Army Corps of Eng’rs*, 440 F.3d 1122, 1133 (9th Cir. 2006) (“application of the single publication rule to the vast majority of Internet publications”). Nearly every court to address the issue has held that a website is not *republished* merely because it is cited or hyperlinked on another site. *See, e.g., Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, No. 02 CV 2258 JM (AJB), 2007 WL 935703, at *7 (S.D. Cal. Mar. 7, 2007) (“providing links to statements already published on the Web, without more . . . does not trigger the republication rule”); *U.S. ex rel. Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058, 1074 (W.D. Wash. 2012) (“a mere reference or URL is not a publication of the contents of the materials referred to”); *Clark v. Viacom Int’l Inc.*, 617 F. App’x 495, 506 (6th Cir. 2015). Thus, the challenged statements in the Sept. 25, 2018 Post were not republished by virtue of a mere hyperlink in the March 5 Post. Nor, pursuant to the same principles, was the Sept. 25, 2018 Post republished via Simon’s tweet linking to the March 5 Post. *See* Compl. ¶ 120(c). This authority applies equally to CoreCivic’s claim that Simon’s tweet of March 6, 2019 republished the March 5 Post by hyperlinking to it. CoreCivic’s claims based on these publications are time barred, and must be stricken.

B. The Family Separation Statements Are Not Actionable

CoreCivic’s defamation claims regarding the Family Separation Statements lack the most

1 basic component of such a claim: a materially false statement of fact. The Family Separation
 2 Statements are not materially false, and do not convey the allegedly false meaning CoreCivic
 3 insists. Moreover, even imagining that Simon’s statements regarding the private prison industry’s
 4 role in immigrant detention somehow, impliedly, indicted the industry as a whole for events that
 5 took place at a few border facilities, that would be a non-actionable expression of Simon’s
 6 opinion, not a defamatory implication.

7 **1. The Family Separation Statements Are Not Materially False**

8 First, CoreCivic cannot allege the Family Separation Statements are materially false. In
 9 libel law, “it is not the literal truth or falsity of each word or detail used in a statement which
 10 determines whether or not it is defamatory.” *Issa v. Applegate*, 31 Cal. App. 5th 689, 702 (2019).
 11 “Minor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the
 12 libelous charge be justified.’” *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1021 (2005) (quoting
 13 *Masson v. New Yorker Magazine*, 501 U.S. 496, 516-17 (1991)). The Complaint asserts
 14 repeatedly that CoreCivic has never “operated any immigration detention facilities for children
 15 separated from their parents pursuant to the government’s family separation policy.” *See, e.g.*,
 16 Compl. ¶ 42. But Simon *never said otherwise*. Rather, the Family Separation Statements more
 17 generally link CoreCivic to a broader movement against private prison operators, as well as to an
 18 overall criticism of incarcerating immigrants and separating families. Critically, CoreCivic *is* a
 19 private prison company, and *does* incarcerate immigrants. *See* Compl. ¶ 7; Ex. 11 at 10. *See also*
 20 Ex. 12 at 16 (disclosing that CoreCivic operates facilities for “individuals being detained by ICE”
 21 and “adults with children who have been detained by ICE”).

22 CoreCivic nevertheless insists that it was “false[]” to “connect[]” CoreCivic “to the
 23 immigrant detention facilities for separated children that were the focus of the Families Belong
 24 Together movement and the resistance to the Trump Administration’s family separation policy”
 25 by referring to the Trump family separation policy and Families Belong Together. Compl. ¶ 47.
 26 First, in making these claims, the Complaint focuses solely on the housing of *minors* separated
 27 from adults, and says nothing about whether CoreCivic houses the *adults* who have been separated
 28 from their minor family members—an essential component of “family separation.” This omission

1 speaks volumes. CoreCivic cannot claim it does not “separate families” by reference to only one
 2 half of the equation. By failing to deny it detains immigrant adults separated from their families,
 3 CoreCivic fails to plead that Simon’s use of the term “family separation” was materially false.

4 Moreover, the alleged “implication” CoreCivic advances—namely that it was specifically
 5 responsible for the “children in cages” at the border, Compl. ¶¶ 35, 47—requires an untenable leap
 6 beyond the content of Simon’s statements themselves. This runs contrary to the California
 7 Supreme Court’s admonition that courts “must refrain from scrutinizing what is not said to find ‘a
 8 defamatory meaning which the article does not convey to a lay reader.’” *Forsher v. Bugliosi*, 26
 9 Cal. 3d 792, 803 (1980) (citation omitted). *Forsher* concerned a book by Vincent Bugliosi, a
 10 former deputy district attorney, concerning the Manson Family murder case, which he tried. The
 11 book reported that the plaintiff was seen with a lawyer before the lawyer’s murder, and noted the
 12 failure of police to investigate the circumstances. *Id.* In that case, as in this one, the plaintiff
 13 alleged that, though there was “no single statement in the book which, standing alone, could be
 14 said to libel” him, the “context” and “cumulative impact” of the book implied he was associated
 15 with the Manson Family and had been involved in the murder. *Id.* at 803-04. The court rejected
 16 the plaintiff’s contention, holding that “the fact that some person might, with extra sensitive
 17 perception, understand such a meaning cannot compel this court to establish liability at so low a
 18 threshold. Rather, the test ... is whether by reasonable implication a defamatory meaning may be
 19 found in the communication.” *Id.* at 805-06.

20 Here, as in *Forsher*, the actual statements at issue do not support the alleged defamatory
 21 implication CoreCivic alleges. Simon’s references to Families Belong Together in the Forbes
 22 Posts do not “convey to a lay reader” that CoreCivic houses minors separated from their families.
 23 Rather, the Forbes Posts truthfully describe how the Families Belong Together coalition was
 24 “galvanized” by the Trump family separation policy, *see* Compl. ¶¶ 36, 43; Ex. 1 at 3 (“Families
 25 Belong Together emerged in response to the family detention crisis”), and has since expanded its
 26 mandate “to form a corporate accountability committee targeting big banks” that finance the
 27 largest private prison companies. Ex. 2 at 2. The Forbes Posts also explains *why* events at private
 28 detention facilities at the border spurred scrutiny of the entire private prison industry: Because

1 “while only 10% of prisons and jails nationwide are for-profit, a third of all immigrant detention
2 centers are privately owned... receiving over \$1B a year in contracts from ICE.” *Id.* None of
3 these statements are alleged to be false, and truthfully describing the evolution of an advocacy
4 movement hardly amounts to a “reasonable implication” of “defamatory meaning.”

5 **2. The Family Separation Statements Are Non-Actionable Opinion**

6 But even accepting—purely for purposes of this motion—that Simon’s statements can be
7 read as blaming all private prisons (including CoreCivic) for events that occurred at a few border
8 facilities, a defamation claim would *still* not lie. This kind of broad criticism would amount to a
9 statement of Simon’s opinion, which is not actionable as a matter of law. *Gardner v. Martino*, 563
10 F.3d 981, 987 (9th Cir. 2009). “Whether an allegedly defamatory statement is one of opinion or
11 fact is a question of law.” *Id.* at 986. In examining whether a statement is one of fact or opinion,
12 courts ask “whether a reasonable factfinder could conclude that the contested statement implies an
13 assertion of objective fact.” *Id.* (citation omitted). In making this evaluation, courts consider the
14 “‘totality of the circumstances’ in which the statement was made,” including “the general tenor of
15 the entire work,” the “the extent of figurative or hyperbolic language used,” and whether the
16 statement is “susceptible of being proved true or false.” *Herring Networks, Inc. v. Maddow*, No.
17 19-cv-1713-BAS-AHG, 2020 WL 2614857, at *3 (S.D. Cal. May 22, 2020). *See also Milkovich v.*
18 *Lorain Journal Co.*, 497 U.S. 1, 24 (1990).

19 Critically, “[c]ontext can be determinative that a statement is opinion and not fact, for the
20 context of a statement may control whether words were understood in a defamatory sense.” *Koch*
21 *v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987); *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d
22 1113, 1123 (C.D. Cal. 1998), *aff’d*, 210 F.3d 1036 (9th Cir. 2000) (statements were opinion in
23 light of context, where they appeared in a newspaper opinion column that “create[d] a setting
24 denoting opinion as opposed to fact”). For instance, in *Partington v. Bugliosi*, 56 F.3d 1147, 1154
25 (9th Cir. 1995)—arising from another book by Vincent Bugliosi about a murder case—the Ninth
26 Circuit considered claims that Bugliosi painted his opposing counsel in the trial as incompetent,
27 thereby defaming him. The court disagreed, and held the statements, though technically factual,
28 were non-actionable opinion. The court noted that “[t]he purpose of the book is to offer the

1 personal viewpoint of the author concerning the trials,” and, “[b]ecause the book outlines
 2 Bugliosi’s own version of what took place, a reader would expect him to set forth his personal
 3 theories about the facts of the trials and the conduct of those involved in them.” *Partington*, 56
 4 F.3d at 1153. Similarly, in *Herring Networks, Inc.*, 2020 WL 2614857, at *1, the court held it was
 5 protected opinion for Rachel Maddow, in reference to an article about a One America News
 6 reporter also working for a Russian state news outlet, to describe OAN as “really literally . . . paid
 7 Russian propaganda.” *Id.* The court noted that “Maddow made the allegedly defamatory
 8 statement on her own talk show news segment where she is invited and encouraged to share her
 9 opinions with her viewers,” and because viewers know that “Maddow does not keep her political
 10 views a secret, . . . audiences could expect her to use subjective language that comports with her
 11 political opinions.” *Id.* at *4.

12 Here, the Forbes Posts are precisely the sort of subjective, partisan publication that readers
 13 would understand to convey Simon’s personal views. Simon’s posts promote the Families Belong
 14 Together coalition’s efforts, and Simon openly discloses her advocacy to dismantle the private
 15 prison industry. *See, e.g.*, Ex. 2 at 3. As in *Partington* and *Herring*, the broad context of the
 16 Forbes Posts indicates to readers that they should be read as conveying Simon’s opinions on social
 17 issues, based on the reporting she cites. To the extent the Forbes Posts contain “implications,” any
 18 reader would understand these to be Simon’s subjective interpretation, not objective facts.

19 Indeed, the specific statements CoreCivic focuses upon express figurative concepts, and
 20 are not easily susceptible to objective verification. In a key challenged statement, Simon writes:
 21 “Since news of family separation at the southern border began shedding more light on
 22 the abuses inside such private facilities, activists across the country have been paying careful
 23 attention to who actually enables private prison companies in their day to day operations.” Ex. 2
 24 at 2. The only “facts” conveyed in this statement are that families have been separated at the
 25 southern border, and that there have been reports of abuse in a number of private prisons—facts
 26 the Complaint does not contest. The remainder of the statement references a general uproar over
 27 the Trump family separation policy, purports to describe the specific mindset of dozens of activists
 28 and activist groups, then characterizes major bank lenders as “enable[rs]” of private prisons.

1 These conceptual linkages are not expressed as objective fact; rather they employ the charged
 2 language of activism. As part of her advocacy, Simon is rhetorically using the uproar over events
 3 at a few border facilities to spur an examination of the entire private prison industry, not offering a
 4 statement of objective fact.²

5 **C. The Lobbying Statements Are Not Actionable**

6 Like the Family Separation Statements, the Lobbying Statements are statements of
 7 Simon’s opinion made in the context of her explicit social advocacy, which disclose (and
 8 hyperlink to) the specific reporting upon which Simon bases her conclusions. Moreover, Plaintiff
 9 has not pled special damages, and cannot demonstrate the Lobbying Statements are defamatory on
 10 their face.

11 **1. The Lobbying Statements Are Opinion**

12 The Lobbying Statements contain an apparently factual assertion—namely, that CoreCivic
 13 and its competitor have together “spent \$25M on lobbying over the past three decades to push for
 14 harsher criminal justice and immigration laws.” Exs. 2, 3; Compl. ¶¶ 71-72. However, this does
 15 not alone make them actionable. *Partington* and *Herring* each involved factual statements, but all
 16 were held to be non-actionable opinion because of the broader context in which they were made.
 17 As set out above, the “general tenor” of the Forbes Posts is akin to an opinion column by Simon,
 18 an activist who is personally involved in a campaign to end private prisons. *Herring Networks*,
 19 2020 WL 2614857, at *3. Both the broader rhetoric and specific context of the Lobbying
 20 Statements signal that Simon is presenting a one-sided interpretation of the facts. In the March 5
 21 Post, Simon writes that “CoreCivic [has] a long history of profiting from mass incarceration” and
 22 that it makes money from “unjustly” filled beds. Ex. 2 at 2. And in the September 30 Post, Simon
 23 indicts CoreCivic for having a “business model” that “depends on keeping a consistent and
 24 increasing number of people incarcerated,” before citing “speculat[ion] and critique[.]” of its

25 _____
 26 ² The Complaint points to Simon’s use of the hashtag #FamiliesBelongTogether in a tweet linking
 27 to the March 5 Post, Compl. ¶ 54, though this tweet is only identified among the allegedly
 28 defamatory statements based on its alleged “republishing” of the March 5 Post. *Id.* ¶¶ 120, 135.
 Even assuming the content of the tweet was also at issue, it would not be actionable. The use of a
 hashtag is not a verifiable assertion of fact, and cannot be read as anything more than a “rhetorical
 statement” that is “normally associated with politics and public discourse in the United States.”
Clifford v. Trump, 339 F. Supp. 3d 915, 925 (C.D. Cal. 2018) (tweet was non-actionable opinion).

1 lobbying practices, with hyperlinked citations to the NPR and Business Insider Articles. Ex. 3
2 at 2. This vague and accusatory language is inconsistent with factual statements.

3 But most critically, the Lobbying Statements are based on disclosed news sources. Within
4 the statements themselves, Simon hyperlinks to the NPR and Business Insider Articles—which
5 report the \$25 million in total lobbying figure, and on efforts by CoreCivic and other private
6 prison companies “in statehouses across the country to lobby for laws that expand demand for
7 their own services,” Ex. 7 at 2. *See also* Ex. 6 at 8-9—underscoring that her statements are
8 interpreting these sources. *See Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1123 (C.D.
9 Cal. 1998), *aff’d*, 210 F.3d 1036 (9th Cir. 2000) (“Because the factual referent is disclosed,
10 ‘readers will understand they are getting the author’s interpretation of the facts presented; they are
11 therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed
12 facts.’”) (citation omitted).³ To the extent CoreCivic merely takes issue with Simon’s use of the
13 term “lobbying” to encompass the legal influence campaigns, strategic political donations, and
14 participation in legislative counsels described in the NPR and Business Insider Articles, that
15 cannot save its claims, because Simon’s usage “falls within an acceptable range of literary
16 license.” *Reader’s Digest Ass’n v. Superior Court*, 37 Cal. 3d 244, 263-64 (1984). In sum, the
17 Lobbying Statements would not be understood by readers as statements of sober fact, but as
18 Simon’s personal interpretation of disclosed reporting in the NPR and Business Insider Articles.

19 **2. The Lobbying Statements Are Not Defamatory**

20 Falsity alone is not sufficient to state a libel claim. “[M]ore is required” – namely, the

21 _____
22 ³ Indeed, in the Updated March 5 and September 30 Posts, Simon noted CoreCivic’s denial that it
23 lobbies on “legislation or policies that would affect the basis for or length of incarceration or
24 detention,” and further clarified that her criticism was based on public “[d]isclosures” showing
25 CoreCivic has “lobbied on a number of bills related to funding for ICE enforcement over the
26 years,” as well as information in the JPI Report (referenced in the *Business Insider* article) that
27 “both companies have served on task forces of the American Legislative Exchange Council
28 (ALEC), which has written and promoted model legislation focused on mandatory minimum
sentences, three strikes laws, and ‘truth in sentencing’ legislation.” Ex. 4 at 2. The Complaint
does not deny any of these facts, but claims the revised passage “falsely conveys to readers that
CoreCivic lobbies for harsher criminal sentences,” and “accus[es] the company of . . . writ[ing]
and promot[ing]” the model legislation Simon described. Compl. ¶¶ 96-97. In other words, the
Complaint can only find falsity in statements that Simon *did not make*. But even to the extent the
revised passage indicates that Simon *suspects* that CoreCivic has sought to influence criminal and
immigration laws, this would still be an expression of Simon’s opinion, based on facts reported in
the sources she discloses—facts the Complaint does not deny.

statement must also be defamatory, and expose the plaintiff to a “reputational injury.” *Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1262 (2017). Under California law, a statement may be found to be defamatory only if it “exposes [plaintiff] to hatred, contempt, ridicule, or obloquy,” “causes him to be shunned or avoided,” or “has a tendency to injure him in his occupation.” Cal. Civ. Code § 45. The Complaint does not plead special damages,⁴ thus CoreCivic must demonstrate the statements at issue are libelous “on their face,” i.e. “without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact.” Cal. Civ. Code § 45a; *Forsher*, 26 Cal. 3d at 806.

Libel “on its face”—or libel per se—exists only if “a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense[.]” *Bartholomew v. YouTube, LLC*, 17 Cal. App. 5th 1217, 1226 (2017). “The determination as to whether a publication is libelous on its face is one of law, and is to be measured by the effect the publication would have on the mind of the average reader.” *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 695 (9th Cir. 1998) (holding it was not defamatory per se “to suggest that [plaintiff] was endorsing alcohol,” without being aware that plaintiff was a recovering alcoholic – “a textbook example of ‘explanatory matter’”). “Perhaps the clearest example of libel per se is an accusation of crime.” *Barnes-Hind, Inc. v. Superior Court*, 181 Cal. App. 3d 377, 385 (1986).

The Lobbying Statements fall far short of meeting the standard for defamation per se. CoreCivic’s very business model revolves around monetizing carceral punishment and the indefinite detention of immigrants. *See* Compl. ¶ 7; *see also* Ex. 12 at 39 (disclosing that CoreCivic’s “growth” could be “adversely affected by the relaxation of enforcement efforts, the expansion of alternatives to incarceration and detention, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by criminal laws”). Accordingly, CoreCivic has every business incentive to maximize the occupancy of its prisons, immigrant detention centers, and other programs, while providing the

⁴ Special damages “must be pled and proved precisely.” *Gomes v. Fried*, 136 Cal. App. 3d 924, 940 (1982); Fed. R. Civ. P. 9(g) (“[i]f an item of special damage is claimed, it must be specifically stated.”) The Complaint does not meet this standard, making only the vague allegation that “Defendants’ statements were calculated to—and did in fact—provoke outrage and cause the company reputational and financial damage.” Compl. ¶¶ 124, 139.

1 minimum of comforts and services. These facts alone may, and perhaps should, “expose”
 2 CoreCivic to “hatred” and cause it to be “shunned or avoided,” Cal. Civ. Code § 45, yet these facts
 3 are not disputed. Rather, CoreCivic takes issue only with the idea that it would attempt to
 4 influence the passage of criminal and immigration legislation through *entirely legal* lobbying
 5 activities. This simply does not rise to the level of defamation per se. The suggestion that
 6 CoreCivic legally lobbies in favor of policies that might improve its bottom line is no worse than
 7 saying tobacco companies have fought health warnings on cigarette packs,⁵ or that gun companies
 8 have lobbied in favor of stand-your-ground laws.⁶ Indeed, a great many in this country support
 9 tough-on-crime laws and harsh immigration policies—namely, the legislation CoreCivic insists it
 10 does not lobby for or against. Disagreement on these issues scarcely rises to defamation, rather, it
 11 is the natural byproduct of political debate. *See Corman v. Blanchard*, 211 Cal. App. 2d 126, 134
 12 (1962) (“while the political and economic views attributed to plaintiff may, . . . make him
 13 unpopular with certain members of the voting public . . . , they are not of such a character that
 14 injury must be presumed from the language itself”); *Harris v. Curtis Publ’g Co.*, 49 Cal. App. 2d
 15 340, 347 (1942) (“We are unable to hold that in commenting upon such a question of public policy
 16 the inclusion of a statement attributing to a public official economic views of a sort which were
 17 then held and accepted by a large part of our population is, in itself” libelous per se). In sum,
 18 because the Lobbying Statements are not defamatory on their face, and CoreCivic has not pled
 19 special damages, the claims based on these statements must be dismissed as a matter of law.

20 **D. CoreCivic Has Not Pled and Cannot Plead Actual Malice**

21 CoreCivic has not plausibly alleged that Defendants acted with actual malice, an

22
 23 ⁵ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled*
 24 *by Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (lawsuit in which tobacco
 companies challenged the FDA’s “rule requiring display of new textual warnings and graphic
 images on cigarette packaging.”)

25 ⁶ *See* Adam Weinstein, “How the NRA and Its Allies Helped Spread a Radical Gun Law
 26 Nationwide,” *Mother Jones* (Jun. 7, 2012), [https://www.motherjones.com/politics/2012/06/nra-](https://www.motherjones.com/politics/2012/06/nra-alec-stand-your-ground)
 27 [alec-stand-your-ground](https://www.motherjones.com/politics/2012/06/nra-alec-stand-your-ground) (reporting how, through ALEC—of which CoreCivic is also a member—
 the NRA has “pushed Stand Your Ground and other gun laws,” funded by tens of millions of
 lobbying funds donated by “gun manufacturers like Beretta, Remington, and Glock.”); Ed
 Pilkington, “NRA ends silence and comes out fighting for stand-your-ground laws,” *The Guardian*
 28 (May 2, 2012), <https://www.theguardian.com/world/2012/may/02/nra-stand-your-ground-law>
 (reporting on statements by the NRA’s lobbying arm in favor of stand-your-ground laws “that it
 helped draft”).

independent reason why its claims must be dismissed. A public figure plaintiff may recover on a defamation claim “only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth,” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)—i.e., that “the defendant in fact entertained *serious doubts* as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added). *See also Reader’s Digest*, 37 Cal. 3d at 256. And, of course, to have actual malice, there must be knowledge or reckless disregard of *falsity*, which cannot be established where the underlying statements are not false.

For a public figure defamation plaintiff to survive a motion to dismiss, it must set out sufficient facts to make a claim of actual malice “plausible on its face,” *Twombly*, 550 U.S. at 570, and “the court must ‘disregard the portions of the complaint where [the Plaintiff] alleges in a purely conclusory manner that the defendants had a particular state of mind in publishing the statements.’” *Resolute Forest Prods., Inc. v. Greenpeace Int’l*, 302 F. Supp. 3d 1005, 1018 (N.D. Cal. 2017) (citation omitted). Where a plaintiff does not plead facts sufficient to give rise to a plausible claim of actual malice, a defamation claim may be dismissed at the earliest stage. *See id.* at 1018-20. Indeed, such early dismissal of deficient claims serves First Amendment interests. “Forcing publishers to defend inappropriate suits through expensive discovery proceedings in all cases would constrict ... breathing space in exactly the manner the actual malice standard was intended to prevent.” *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016).

Here, the Complaint *admits* that Simon relied on reputable publications in making the Lobbying Statements—and even alleges she *should have* relied on these sources—and the other allegations relating to actual malice are either conclusory, contradictory, or simply not evidence of actual malice as a matter of law. CoreCivic cannot plead or begin to prove this essential element.

1. *CoreCivic is a Public Figure*

Preliminarily, CoreCivic cannot contest it is, at minimum, a limited purpose public figure for the purposes of the statement challenged in this action. Those who have “voluntarily inject[ed]” themselves or have been “drawn into” that controversy may be treated as public figures. *Reader’s Digest*, 37 Cal. 3d at 253-54 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323,

351 (1974)). In analyzing whether an entity is a limited-purpose public figure, courts consider whether: (1) there is a public controversy, *i.e.*, where “the issue was being debated publicly and ... had foreseeable and substantial ramifications for nonparticipants”; (2) plaintiff took “some *voluntary* act through which he seeks to influence the resolution of the public issues involved”; and (3) the alleged defamation was “germane to the plaintiff’s participation in the controversy.” *Copp v. Paxton*, 45 Cal. App. 4th 829, 845-46 (1996) (plaintiff was a public figure in his “limited local efforts to inject himself into” a public debate surrounding earthquake disaster mitigation in public schools) (quoting *Reader’s Digest*, 37 Cal. 3d at 253). The question of a plaintiff’s public figure status can be determined at the pleading stage where the Complaint’s “own allegations” demonstrate these factors are satisfied. *See Resolute Forest Prods.*, 302 F. Supp. 3d at 1017.

First, the role of private corporations in imprisoning convicts and detaining immigrants is indisputably a matter of public controversy, not in the least because these functions are entirely taxpayer funded. Taxpayer funded public projects have been held to be matters of public controversy. *See, e.g., Carr v. Forbes, Inc.*, 259 F.3d 273, 279 (4th Cir. 2001) (noting that “[p]ublic projects, by definition, exist for the public at large,” and holding a developer was a public figure for purposes of an article concerning a public works project he developed); *McDowell v. Paiewonsky*, 769 F.2d 942, 950 (3d Cir. 1985) (architect for a large public project was a limited purpose public figure because the project “almost inevitably put him into the vortex of a public controversy”). The treatment of prisoners has also been held to raise issues of “grave public concern.” *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 294 (4th Cir. 2008) (finding private provider of interrogation services at Abu Ghraib prison was a public figure).

CoreCivic is one of the largest operators of prisons and detention in the country, *see* Compl. ¶ 47, and “surely knew” that this business model would “potentially expose it[] to the inhospitable climate of media criticism.” *CACI*, 536 F.3d at 295. Indeed, CoreCivic admits that it has levied its position of prominence to lobby on issues of public policy. Compl. ¶ 7. By its own conduct and admission, CoreCivic has voluntarily inserted itself into a field of “grave public concern,” and has sought to influence policy in that field. Finally, because the Forbes Posts relate

1 directly to CoreCivic's role as an operator of private prisons and immigrant detention centers, the
 2 last factor is satisfied. CoreCivic is a public figure for purposes of the Forbes Posts.

3 **2. CoreCivic Does Not Plausibly Allege, and Cannot Show, Actual Malice**

4 The Complaint attempts to raise an inference of actual malice by alleging the following:

5 (1) Defendants had a financial motivation for publishing statements critical of CoreCivic because
 6 they hoped that after divesting from CoreCivic, investors would "redirect[]" capital to Candide's
 7 financial "products" (Compl. ¶¶ 46-48); (2) CoreCivic has a statement on its website denying it
 8 houses "unaccompanied minors" (*id.* ¶ 58); (3) Defendants had read CoreCivic's denials relating
 9 to the Lobbying Statements in the NPR Article and Business Insider Article, as well as on other
 10 websites (*id.* ¶¶ 81-83, 86-90); (4) Defendants did not reach out to CoreCivic for comment (*id.* ¶¶
 11 61, 91); and (5) Defendants' updates to the March 5 Post and September 30 Post did not satisfy
 12 CoreCivic, including because they did not remove the hyperlink to the Sept. 25, 2018 Post (*id.* ¶¶
 13 62-68; 92-103). None of these allegations are sufficient to plead actual malice.

14 *First*, CoreCivic's attenuated theory that Defendants hoped to financially benefit from the
 15 loss to CoreCivic's business is implausible on its face. It presumes, without justification, that an
 16 investor who decided to divest itself from CoreCivic because of bad publicity would somehow
 17 automatically redirect its assets toward Simon. To credit this theory would in effect nullify the
 18 actual malice pleading requirement, and allow not just CoreCivic, but any business Simon has
 19 criticized to sue her on the same theory of "redirected capital," merely because she is a financial
 20 advisor. *See also Reeder v. Carroll*, 759 F. Supp. 2d 1064, 1089–90 (N.D. Iowa 2010) (claim by
 21 plaintiff that a doctor wrote letters critical of his medical work because that doctor had a "financial
 22 interest" in his own competing hospital's success, were "insufficient to support a finding" of
 23 actual malice.) Moreover, the allegations do not explain why a financial interest in criticizing
 24 CoreCivic would equate to a motivation *to lie*. *See Tavoulareas v. Piro*, 817 F.2d 762, 796 (D.C.
 25 Cir. 1987) (a motivation to publish sensational or negative stories was insufficient to show actual
 26 malice, where there was no evidence of a specific motivation to lie or disregard the truth).
 27 CoreCivic's theory of expected indirect benefit as evidence of actual malice should be rejected.

1 *Second*, CoreCivic’s allegations that Simon knew of its denials and that she did not reach
 2 out for comment do not support actual malice. Denials by the subject of a negative article do not
 3 raise an inference of actual malice, *Worrell-Payne v. Gannett Co.*, 49 F. App’x 105, 108 (9th Cir.
 4 2002) (Defendants’ knowledge that plaintiff made “statements [] in her own defense at a press
 5 conference” and distributed packet of “corrective information” did not support a finding of actual
 6 malice), nor does Simon’s failure to reach out for comment. *DARE America v. Rolling Stone*
 7 *Magazine*, 101 F. Supp.2d 1270, 1284 n.3 (C.D. Cal. 2000) (“Plaintiff’s suggestion that
 8 Defendants’ failure to contact [plaintiff] before publishing [the] article evidences actual malice is
 9 ... legally misguided. Defendants were not required to contact the subjects of the article before
 10 publication”), *aff’d*, 270 F.3d 793 (9th Cir. 2001).

11 *Third*, CoreCivic cannot allege actual malice as to the Family Separation statements
 12 because actual malice requires knowledge of falsity, and the statements *are not false*. See Section
 13 II.B.1, *supra*. The Complaint nevertheless alleges that Simon knew the statements would be
 14 *understood* as false, as demonstrated by Simon’s clarification to the March 5 Post. The Complaint
 15 glosses over the fact that Simon’s clarification (made eight days after CoreCivic’s correction
 16 request, see Compl. ¶¶ 62, 65) opens with “***This article does not intend to suggest that CoreCivic***
 17 ***. . . housed children separated from their parents pursuant to the Trump family separation***
 18 ***policy.***” Ex. 4 at 5. This statement goes to the heart of CoreCivic’s concern, and demonstrates
 19 Simon’s desire that her truthful statements be understood correctly. See *Trans World Accounts,*
 20 *Inc. v. Associated Press*, 425 F. Supp. 814, 823, n.6 (N.D. Cal. 1977) (publication of a corrective
 21 story “only nine days after publication of the erroneous story” would “create a large obstacle to
 22 plaintiff’s efforts to prove actual malice.”). That Simon’s clarification apparently did not satisfy
 23 CoreCivic also does not, as a matter of law, constitute evidence of actual malice. *New York Times*
 24 *Co. v. Sullivan*, 376 U.S. 254, 286 (1964) (failure to retract upon demand is “not adequate
 25 evidence of malice for constitutional purposes”); *D.A.R.E.*, 101 F. Supp. 2d at 1287 (“If a
 26 publisher’s wholesale refusal to retract . . . did not constitute actual malice, it follows that a
 27 publisher’s retraction which does not satisfy the aggrieved party surely is not actionable.”).
 28

Finally, and most critically, CoreCivic’s allegations not only fail to raise an inference of actual malice, they in fact *preclude* any such a determination with regard to the Lobbying Statements. This is because the Complaint admits that Simon relied on the NPR Article and Business Insider Article in making the statements—and even faults her for *not* crediting statements in these articles (namely, CoreCivic’s own denials). *See* Compl. ¶¶ 80-82. Under settled law, “[g]ood faith reliance on previously published reports in reputable sources . . . precludes a finding of actual malice.” *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1297 (D.C. Cir. 1988); *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002) (“One who repeats what he hears from a reputable news source, with no individualized reason external to the news report to doubt its accuracy, has not acted recklessly.”); *Reader’s Digest*, 37 Cal. 3d at 259 (“Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate”) (citations omitted).

CoreCivic relies on the NPR and Business Insider Articles as proof that it never lobbied in favor of criminal or immigration law, *see* Compl. ¶¶ 80-82, but again, it quotes only its *very own denials* within the articles, and suggests misleadingly that the articles reported these denials as fact. To the contrary, the two articles paint a damning picture of efforts by CoreCivic to influence criminal and immigration legislation through participation in the legislative counsel ALEC, strategic donations to politicians, and state-level lobbying. *See* Exs. 6-7; Burke Decl. ¶¶ 7-8. The Business Insider Article reports that, notwithstanding CoreCivic’s denials, the JPI Report documented “several pieces of federal legislation the [CoreCivic] lobbied on in recent years, including funding related to private prisons and Immigrations and Customs Enforcement (ICE) detention.” Ex. 7 at 2. The NPR Article also notes how CoreCivic “hired a powerful new lobbyist to work the [Arizona] capitol” the “same week” a controversial law criminalizing illegal immigrants “hit the Arizona statehouse floor.” Ex. 6 at 8. Finally, even assuming Simon’s statements were not perfectly accurate in summarizing the thrust of these articles, this also cannot be evidence of actual malice. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512–13 (1984) (where “adoption of the language chosen was ‘one of a number of possible rational interpretations’ of an event ‘that bristled with ambiguities’” . . . “[t]he choice of such language,

1 though reflecting a misconception, does not place the speech beyond the outer limits of the First
 2 Amendment’s broad protective umbrella”). As a matter of law, it was entirely reasonable, and
 3 indeed inconsistent with any inference of actual malice, for Simon to rely on the NPR and
 4 Business Insider Articles to come to the conclusion that CoreCivic “lobb[ies] . . . to push for
 5 harsher criminal justice and immigration laws.” Ex. 2 at 2; Ex. 3 at 2.

6 In fact, after receiving CoreCivic’s letter demanding a retraction, Simon updated both posts
 7 to clarify that CoreCivic “say[s] that [it doesn’t] lobby on legislation or policies that would affect
 8 the basis for or length of incarceration or detention,” and cited specific additional sources. *See* Ex.
 9 4 at 2, Ex. 5 at 3 (each noting that, “according to the Justice Policy Institute,” CoreCivic has
 10 “served on task forces of the American Legislative Exchange Council (ALEC), which has written
 11 and promoted model legislation focused on mandatory minimum sentences, three strikes laws, and
 12 ‘truth in sentencing’ legislation” and has “lobbied on a number of bills related to funding for ICE
 13 enforcement over the years.”). *See also* Compl. ¶ 95. Simon also linked to an OpenSecrets.org
 14 lobbying database and the JPI Report, which shows that in 2019 CoreCivic lobbied on several bills
 15 relating to the Department of Homeland Security. Ex. 8 at 23; Burke Decl. ¶ 9. *See also* Compl. ¶
 16 89 n. 31 (citing the OpenSecrets.org report). In short, the Complaint demonstrates Simon’s
 17 reliance on, and citation to, reliable sources, as well as her willingness to promptly update her
 18 statements to be more precise. These acts are utterly inconsistent with any claim of actual malice.
 19 *See Resolute Forest Prods.*, 302 F. Supp. 3d at 1019 (holding that where the defendant retracted
 20 allegedly inaccurate statement based upon “faked” source material, “[t]he plausible inference from
 21 this allegation is that Greenpeace made a mistake, not that it acted with malice,” and dismissing
 22 claims for failure to plead actual malice); *Trans World Accounts*, 425 F. Supp. at 823, n.6.

23 Because CoreCivic has not plausibly alleged any facts that support its claim of actual
 24 malice as to the Lobbying Statements—or indeed as to any of the statements at issue—the
 25 Complaint may be dismissed on this basis alone.

26 CONCLUSION

27 For all the reasons set forth above, the Court should strike the Complaint in full, and award
 28 Simon her attorney’s fees and costs, in motion that will be filed later.

DAVIS WRIGHT TREMAINE LLP

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Dated: August 6, 2020

Respectfully submitted,

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